No. 84-701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Petitioner

v.

RIVERSIDE BAYVIEW HOMES, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE

NATIONAL WILDLIFE FEDERATION, STATE OF ALASKA, AMERICAN FISHERIES SOCIETY, BASS ANGLERS SPORTSMAN SOCIETY, CHESAPEAKE BAY FOUNDATION, INC., ENVIRONMENT COUNCIL OF RHODE ISLAND, INC., ENVIRONMENTAL DEFENSE FUND, INC., ENVIRONMENTAL POLICY INSTITUTE, STATE OF FLORIDA, FLORIDA AUDUBON SOCIETY, FLORIDA WILDLIFE FEDERATION, LOUISIANA WILDLIFE FEDERATION, STATE OF MICHIGAN, MICHIGAN UNITED CONSERVATION CLUBS, INC., NATIONAL AUDUBON SOCIETY, NORTH CAROLINA WILDLIFE FEDERATION, SCENIC HUDSON, INC., SIERRA CLUB, SOUTH CAROLINA WILDLIFE FEDERATION, TENNESSEE CONSERVATION LEAGUE, TROUT UNLIMITED, WILDLIFE FEDERATION OF ALASKA, WILDLIFE MANAGEMENT INSTITUTE, and WISCONSIN WILDLIFE FEDERATION, INC.

IN SUPPORT OF PETITIONER

FRANK J. KELLEY
Attorney General
LOUIS CARUSO
Solicitor General
State of Michigan
760 Law Building
Lansing, Michigan 48913
(517) 373-1110

JERRY JACKSON
National Wildlife Federation
1412 Sixteenth St., N.W.
Washington, DC 20036
(202) 797-6827

Counsel of Record and Attorney for Amici Curiae

PANDICK WASHINGTON, D.C.—1801 N. OAK STREET, ARLINGTON, VA 22209—(703) 522-6000

QUESTION PRESENTED

Whether the definition of wetlands for purposes of Clean Water Act regulation correctly includes wetland areas that are not frequently flooded by adjacent streams.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTERESTS OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE DISTRICT COURT PROPERLY ENJOINED FILLING ACTIVITY WITHIN AREAS OF RIVERSIDE'S TRACT THAT MEET THE REGULATORY DEFINITION OF WETLANDS	3
II. CONGRESS INTENDED THE GEOGRAPHIC REACH OF SECTION 404 TO BE FREE OF TRADITIONAL JURISDICTION LIMITS	7
III. THE 1977 LEGISLATIVE HISTORY DEMONSTRATES A CONTINUED LEGISLATIVE COMMITMENT TO SECTION 404's GEOGRAPHIC JURISDICTION ESPECIALLY WITH REGARD TO WETLANDS	11
IV. THE REGULATORY AGENCIES' DEFINITIONS OF "WETLANDS" FULFILL CONGRESSIONAL INTENT BY IDENTIFYING WETLAND AREAS LIKELY TO PERFORM FUNCTIONS CONGRESS CONSIDERED TO BE VALUABLE	15
V. THE DECISION OF THE COURT BELOW IMPOSES AN ARTIFICIAL JURISDICTIONAL LIMITATION ON SECTION 404 THAT EXCLUDES WETLANDS THAT CONGRESS INTENDED TO REGULATE	18
VI. SECTION 404 REGULATION OF RIVERSIDE'S WETLAND IS WELL WITHIN CONGRESS' CONSTITUTIONAL AUTHORITY	21
A. The Just Compensation Clause Does Not Preclude Congress' Authority to Regulate Discharges Into Wetlands	21
B. Congress' Determination That Destruction of Wetlands Substantially Affects Interstate Commerce Has a Rational Basis	23
CONCLUSION	28
APPENDIX A	1a

TABLE OF AUTHORITIES

CASES:	Page
Bell v. New Jersey, 461 U.S. 773 (1983)	13
Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979)	15
Chemical Manufacturers Ass'n v. NRDC, 105 S. Ct. 1102 (1985)	13
Colautti v. Franklin, 439 U.S. 379 (1979)	10
The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870)	8
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)	23
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)	24
Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981)	22-24, 26-27
Kaiser Aetna v. United States, 444 U.S. 164 (1979)	21-22
Maryland v. Wirtz, 392 U.S. 183 (1968)	23
Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617 (8th Cir. 1979)	14
Missouri v. Holland, 252 U.S. 416 (1920)	25
Mount Sinai Hosp. v. Weinberger, 517 F.2d 329 (5th Cir. 1975)	13
Natural Resources Defense Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1985)	10,13
North Dakota v. United States, 460 U.S. 300 (1983)	24-25
Perez v. United States, 402 U.S. 146 (1971)	23
Reiter v. Sonotone Corp., 442 U.S. 330 (1979)	15
Ruckelshaus v. Monsanto Co., 104 S.Ct. 2862 (1984)	22
Swanson v. United States, 600 F. Supp. 802 (D. Idaho 1985), appeal pending, No. 85-3718 (9th Cir.)	21
United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940)	23
United States v. Ciampitti, 583 F. Supp. 483 (D.N.J. 1984), appeal pending, No. 85-5004 (3rd Cir.)	21

	Page
United States v. City of Fort Pierre, 747 F.2d 464 (8th Cir. 1984)	21
United States v. Darby, 312 U.S. 100 (1941)	23,26-27
Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984)	25
Wickard v. Filburn, 317 U.S. 111 (1942)	27
STATUTES AND REGULATIONS:	
Clean Water Act, 33 U.S.C. 1251 *et seq.*	
33 U.S.C. 1251(a)	8,14
33 U.S.C. 1251(a)(2)	9,14
33 U.S.C. 1288(i)	16
33 U.S.C. 1311(a)	3,10,16
33 U.S.C. 1319	10,16
33 U.S.C. 1344	*passim*
33 U.S.C. 1344(a)	3
33 U.S.C. 1344(c)	14,16
33 U.S.C. 1344(g)	14-15
33 U.S.C. 1362(6)	3
33 U.S.C. 1362(7)	3,9-10
Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246	7
Federal Water Pollution Control Act Amendments of 1956, ch. 518, 70 Stat. 498	7-8
Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204	7-8
Rivers and Harbors Act of 1899, 33 U.S.C. 403 and 407	8
Tucker Act, 28 U.S.C. 1491	22
Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155	7-8
Water Quality Act of 1965, Pub. L. 89-234, 79 Stat. 903	7
Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91	7
33 C.F.R. 323.2(a) (1984)	4,7

	Page
33 C.F.R. 323.2(c) (1984)	4-6,16-17
40 C.F.R. 230.3(s) (1984)	4
40 C.F.R. 230.3(t) (1984)	4-5,16-17
40 Fed. Reg. 31324-31325, formerly codified at 33 C.F.R. 209.120(d)(2)(i)(*h*)	4,10
42 Fed. Reg. 37128	17-18,21
42 Fed. Reg. 37144	7
47 Fed. Reg. 31810-31811	7
49 Fed. Reg. 39484, to be codified at 33 C.F.R. 330.5(a)(26)(ii)	7
MISCELLANEOUS:	
F. Bellrose, Ducks, Geese & Swans of North America (1976)	25
Congressional Research Service, 95th Cong., 1st Sess., Legislative History of the Federal Water Pollution Control Act Amendments (1973 and 1978)	*passim*
Gosselink & Turner, The Role of Hydrology in Freshwater Wetland Ecosystems, in Good, et al. (eds.), Freshwater Wetlands: Ecological Processes and Management Potential (1978)	17
Harper & Row's Complete Field Guide to North American Wildlife (Eastern ed. 1981)	6
Library of Congress, Case Law Under the Federal Water Pollution Control Act Amendments of 1972, House Public Works and Transportation Committee Print 95-35	13
McCormick, Ecology and the Regulation of Freshwater Wetlands, in Good, et al. (eds.), Freshwater Wetlands: Ecological Processes and Management Potential (1978)	17
Office of Technology Assessment, Wetlands: Their Use and Regulation (1984)	27
Office of Technology Assessment, Wetland Use and Regulation: Alaska Case Study (1983)	19
43 Op. Att'y Gen. No. 15 (Sept. 5, 1979)	4

	Page
C. Richardson, Pocosin Wetlands (1981)	19,25
2A C. Sands, Statutes and Statutory Construction (4th ed. 1984 rev.)	10
U.S. Army Engineer Waterways Experiment Station, Preliminary Guide to the Onsite Identification and Delineation of the Wetlands of the Interior United States (1982)	5,17
2 [1961] U.S. Code Cong. & Ad. News 2082-2084	8
U.S. Fish & Wildlife Service, Classification of Wetlands and Deepwater Habitats of the United States (1979)	5,16-17
U.S. Fish & Wildlife Service, 1980 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation	25
U.S. Fish & Wildlife Service, Wetlands of the United States: Current Status and Recent Trends (1984)	16,19,21, 25
Want, Federal Wetlands Law: The Cases and the Problems, 8 Harv. Envt'l L. Rev. 1 (1984)	8,10
M. Weller, Freshwater Marshes: Ecology and Wildlife Management (1981)	17,19,21
Wenner, Federal Water Pollution Control Statutes in Theory and Practice, 4 Envt'l Law 251 (1974)	8
D. Zwick & M. Benstock, Water Wasteland (1971)	8,27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-701

UNITED STATES OF AMERICA,
Petitioner

v.

RIVERSIDE BAYVIEW HOMES, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE

NATIONAL WILDLIFE FEDERATION, STATE OF ALASKA, AMERICAN FISHERIES SOCIETY, BASS ANGLERS SPORTSMAN SOCIETY, CHESAPEAKE BAY FOUNDATION, INC., ENVIRONMENT COUNCIL OF RHODE ISLAND, INC., ENVIRONMENTAL DEFENSE FUND, INC., ENVIRONMENTAL POLICY INSTITUTE, STATE OF FLORIDA, FLORIDA AUDUBON SOCIETY, FLORIDA WILDLIFE FEDERATION, LOUISIANA WILDLIFE FEDERATION, STATE OF MICHIGAN, MICHIGAN UNITED CONSERVATION CLUBS, INC., NATIONAL AUDUBON SOCIETY, NORTH CAROLINA WILDLIFE FEDERATION, SCENIC HUDSON, INC., SIERRA CLUB, SOUTH CAROLINA WILDLIFE FEDERATION, TENNESSEE CONSERVATION LEAGUE, TROUT UNLIMITED, WILDLIFE FEDERATION OF ALASKA, WILDLIFE MANAGEMENT INSTITUTE, and WISCONSIN WILDLIFE FEDERATION, INC.

IN SUPPORT OF PETITIONER

INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 36.2 the National Wildlife Federation and the above-listed states and organizations

file this brief as amici curiae in support of the petitioner United States. Letters of consent from counsel for the parties have been filed with the clerk.

Amici curiae are the states of Alaska, Florida, and Michigan and non-profit membership organizations dedicated to the conservation and wise use of natural resources including wetlands. Members and citizens of amici curiae regularly use and enjoy the wetlands of the United States for outdoor recreation, including fishing, hunting, hiking, camping, nature observation, photography, scientific study, and aesthetic enjoyment. Members and citizens of amici curiae also have a substantial interest in the protection and preservation of wetlands because these resources contribute to the maintenance and restoration of the chemical, physical, and biological integrity of the Nation's waters. Members and citizens of amici curiae will be adversely affected by a judicial decision that removes important wetlands from the regulatory scope of Section 404 of the Clean Water Act, 33 U.S.C. 1344.

Amici curiae have participated extensively in all facets of public decisionmaking on the use of wetlands. Amici curiae support Section 404 of the Clean Water Act including its application in a broad geographical sense to wetlands. Amici curiae have also brought, entered, and filed amicus curiae briefs in numerous lawsuits involving Section 404 and wetlands. A more detailed statement of the interests of amici curiae is set out as Appendix A to this brief.

SUMMARY OF ARGUMENT

The district court properly enjoined respondent from conducting unpermitted filling in an area that clearly meets the definition of "wetlands" implemented by the Army Corps of Engineers and the Environmental Protection Agency. The court of appeals incorrectly reversed by relying on a reading of that definition that is totally at odds with its plain meaning.

The regulatory definition of wetlands is consistent with congressional intent that Section 404 of the Clean Water Act extend to wetlands of the type at issue here, regardless of

traditional standards of navigability. In 1977 Congress specifically reconsidered the jurisdictional limits of Section 404 and consciously refrained from narrowing those limits, thus reaffirming the statute's purpose of protecting wetlands because of the important functions they serve. The regulatory definition is also scientifically valid and encompasses areas most likely to perform the congressionally desired functions.

The court of appeals' reliance on the Just Compensation Clause to narrow the jurisdictional scope of Section 404 is completely misplaced. That some takings may occur under Section 404 does not render the statute or its implementing regulations invalid. Instead, the Commerce Clause provides the proper test of Congress' constitutional authority to regulate the filling of wetlands. The significant contribution to interstate commerce made by wetlands is lost upon their destruction. A regulatory effort to control this destruction is well within Congress' plenary power to regulate interstate commerce.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ENJOINED FILLING ACTIVITY WITHIN AREAS OF RIVERSIDE'S TRACT THAT MEET THE REGULATORY DEFINITION OF WETLANDS.

Section 301(a) of the Clean Water Act prohibits "the discharge of any pollutant" except in compliance with specified sections of the Act. 33 U.S.C. 1311(a). One of the specified sections is Section 404 which authorizes the Secretary of the Army to issue permits "for the discharge of dredged or fill material into the navigable waters . . . ." 33 U.S.C. 1344(a). The term "pollutant" is defined by the Act to include materials such as "dredged spoil, solid waste, . . . rock, sand, [and] cellar dirt . . . ." 33 U.S.C. 1362(6). The Act defines "navigable waters" to mean "waters of the United States. . . ." 33 U.S.C. 1362(7).

The Secretary of the Army has designated the Army Corps of Engineers (Corps) as the agency responsible for issuing

permits under Section 404. The United States Environmental Protection Agency (EPA) also has certain Section 404 responsibilities, including the "ultimate administrative authority to determine" the meaning of "waters of the United States" under that Section. 43 Op. Att'y Gen. No. 15, at 1 (Sept. 5, 1979). Both the Corps and EPA interpret "waters of the United States" to include wetlands. 33 C.F.R. 323.2(a) and (c) (1984) (Corps); 40 C.F.R. 230.3(s) and (t) (1984) (EPA).

This case arose from the failure of the respondent Riverside Bayview Homes, Inc. (Riverside) to obtain a Section 404 permit before discharging fill material into wetlands located in Michigan near Lake St. Clair. The United States brought this action to enjoin those unpermitted activities.

The district court held seven days of hearings and visited the site primarily to determine whether the Riverside tract contained a wetland. The court relied upon Section 404 regulations promulgated by the Corps that defined "freshwater wetlands" to include areas "periodically inundated" and "characterized by . . . vegetation" requiring saturated soil conditions. 40 Fed. Reg. 31324-31325 (July 25, 1975), formerly codified at 33 C.F.R. 209.120(d)(2)(i)(*h*), quoted at Pet. App. 23a. The district court found that the Riverside tract meets the terms of this definition and enjoined further unpermitted filling (Pet. App. 22a-31a).

By the time of Riverside's initial appeal, the Corps had revised its definition of wetlands through regulations promulgated in 1977. The court of appeals remanded the appeal for reconsideration in light of the new definition. On remand the district court reaffirmed its earlier decision (Pet. App. 42a-44a).

The Corps' 1977 definition remains in effect today and has been adopted in identical form by EPA. It reads:

> The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R. 323.2(c) (Corps) and 40 C.F.R. 230.3(t) (EPA). The Record compiled in the district court demonstrates that Riverside's tract contains a wetland within the meaning of the Corps' and EPA's present definitions.

The wetland on Riverside's site is characterized by plants such as cattails, sedge, duckweed, and common reed (J.A. 28,33,55,59, and 75; Tr. Jan. 15, 1977 at 14 and 21). These species are recognized as "typically adapted for life in saturated soil conditions," 33 C.F.R. 323.2(c), in that they require or are tolerant of water-logged or highly saturated soils. U.S. Army Engineer Waterways Experiment Station, Preliminary Guide to the Onsite Identification and Delineation of the Wetlands of the Interior United States 9-12 and A1-A10 (1982) (hereafter "Preliminary Guide to Wetlands"); U.S. Fish & Wildlife Service, Classification of Wetlands and Deepwater Habitats of the United States 3 (1979) (hereafter "Classification of Wetlands").

Moreover, these plants on the Riverside tract live in an area that is "inundated or saturated by surface or ground water." The tract is occasionally flooded (Pet. App. 28a-29a; J.A. 118) and was covered by ice at the time of the January 1977 hearing (J.A. 47-48). More importantly the tract is saturated by ground water as demonstrated by a water table within inches of the surface and a soil type (called Lamson) which is highly retentive of water (J.A. 21 and 112; Tr. Jan. 21, 1977 at 163).

The ground water saturation is of a "frequency and duration sufficient to support" species adapted to "saturated soil conditions," namely, cattails, reeds, sedges, and similar species found on the site. The area has been a wetland for decades and is a part of a larger wetland area found on the western shore of Lake St. Clair (located less than a mile from the site) (J.A. 48 and 56; Tr. Jan. 15, 1977 at 155 and 158). The tract is also inhabited by wildlife species such as muskrat and long-billed marsh wrens (J.A. 41-42 and 55) which are

found almost exclusively in wetlands habitat. Harper & Row's Complete Field Guide to North American Wildlife 150 and 265 (Eastern ed. 1981).

Notwithstanding the wealth of evidence showing that the tract is a wetland within the Corps' present definition, the court of appeals reversed, ruling that the site is not a wetland for Section 404 purposes. The court of appeals' analysis is not entirely clear but the decision seems to rest on three grounds: (1) the site does not meet the present regulatory definition of a wetland (Pet. App. 8a-12a), (2) Congress probably did not intend to include such an area within the geographic reach of Section 404 (Pet. App. 13a-16a and 20a-21a), and (3) inclusion of such an area within Section 404 would result in a taking under the Fifth Amendment (Pet. App. 13a-16a).

The first ground for the decision of the court below is plainly wrong. The court of appeals focused its attention solely on the portions of the 1977 definition referring to *inundation* "at a frequency and duration sufficient to support, and that under normal circumstances [does] support wetlands vegetation" (Pet. App. 10a quoting 33 C.F.R. 323.2(c) [brackets in original]). In fact, the court fashioned its own test for geographic jurisdiction, ruling that Section 404 applies only to areas "frequently flooded by waters from adjacent streams. . . ." (Pet. App. 15a). Since, in the court's view, the wetland vegetation found on the site was not caused by "frequent" inundation (see *id.* at 10a-12a & n.3), the court ruled that the area is not subject to regulation under Section 404 (*id.* at 12a and 15a-16a).

However, the court of appeals' conclusion is completely at odds with the plain meaning of the Corps' definition. By its express terms, the regulation encompasses wetland areas "inundated *or saturated* by surface *or ground water*" sufficient to support vegetation capable of surviving "in *saturated soil conditions.*" 33 C.F.R. 323.2(c) [emphasis added]. The court's requirement that wetlands must be "frequently flooded by . . . adjacent streams" (Pet. App. 15a), regardless of the contribution made to wetlands vegetation by saturation from ground water and by saturated soil conditions, is contrary to the

language of the Corps' definition. Nonetheless, the court of appeals never explained or even acknowledged the regulatory language that is inconsistent with the result it reached.[1]

When read as a whole, the regulation plainly includes the Riverside tract as a wetland. Because Riverside failed to obtain a Section 404 permit, the district court's judgment for the United States and injunction against further filling should have been affirmed. However, to the extent the court of appeals' decision may be read to implicitly cast doubt on the statutory or constitutional validity of the regulatory definition of wetlands, such issues are addressed in the following discussion.

II. CONGRESS INTENDED THE GEOGRAPHIC REACH OF SECTION 404 TO BE FREE OF TRADITIONAL JURISDICTION LIMITS.

Section 404 was enacted into law as part of the Federal Water Pollution Control Act Amendments of 1972 (1972 Act), 33 U.S.C. 1251 *et seq.*, renamed the Clean Water Act in 1977. The 1972 Act was born of the congressional perception that six federal statutes passed in the previous 24 years [2] to protect the aquatic environment "ha[d] been inadequate in every vital aspect." Congressional Research Service, 95th Cong., 1st Sess., Legislative History of the Federal Water Pollution Control Act Amendments (hereafter "Leg. Hist.") Vol. 2 at 1425 (1973) (Senate Committee Report).

---

[1] The court of appeals decision is also flatly contradicted by the Corps' regulatory definition of "waters of the United States." 42 Fed. Reg. 37144 (July 19, 1977) and 47 Fed. Reg. 31810-31811 (July 22, 1982), codified at 33 C.F.R. 323.2(a). Since 1977 the Corps' definition of "waters of the United States" has referred to types of wetlands such as "isolated" wetlands and prairie potholes that have no clear surface water hydrologic connection to traditional navigable waters. *Id.*, see also 49 Fed. Reg. 39484 (Oct. 5, 1984), to be codified at 33 C.F.R. 330.5(a)(26)(ii) (defining "isolated" wetlands). EPA's definition of "waters of the United States" also includes such wetlands. 40 C.F.R. 230.3(s).

[2] Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155; Federal Water Pollution Control Act Amendments of 1956, ch. 518, 70 Stat. 498; Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204; Water Quality Act of 1965, Pub. L. 89-234, 79 Stat. 903; Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246; Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91.

One "vital aspect" was the lack of adequate enforcement. *Id.* at 1423. All of the preceding legislation provided for some form of federal enforcement authority but only one enforcement action was brought between 1948 and 1972 and it was largely a failure.[3] *Id.* This abysmal record resulted in part from restrictions imposed by these statutes on the geographic jurisdiction of federal enforcement agencies. Under the pre-1972 legislation, federal abatement suits were limited to cases where it could be proved that discharges in one state endangered health or welfare in another state. Abatement suits were also limited to pollution of interstate, navigable-in-fact, or coastal waters.[4]

Congressional awareness of the jurisdictional limitation and similar problems led to the creation of a completely new Act in 1972 intended to provide a clean break with past outmoded and ineffective legislative approaches.[5] The very first sentence of the new Act announced Congress' ambitious aim to provide effective federal protection of America's aquatic environment:

> The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

33 U.S.C. 1251(a). The House Committee further amplified this goal by explaining that the word "integrity" was intended

[3] The case concerned sewage disposal by a midwestern city. After six years of enforcement effort the city was still treating only half of its sewage and dumping more than five million tons of raw sewage per day. 2 Leg. Hist. 1423.

[4] See note 2 *supra*. 1948 Act, §§ 2(d) and 3(e); 1956 Act §§ 8 and 11(e); 1961 Act §§ 8 and 8(f)(2), see 2 [1961] U.S. Code Cong. & Ad. News 2082-2084 (House Committee Report) (definition of "navigable waters"). For more detailed discussion of the inadequacies of pre-1972 legislation see D. Zwick & M. Benstock, Water Wasteland (1971); Wenner, Federal Water Pollution Control Statutes in Theory and Practice, 4 Envt'l Law 251 (1974).

[5] Sections 10 and 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403 and 407, were also in force in 1972. The geographic jurisdiction of both is limited to waters navigable-in-fact. See *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870); see also Want, Federal Wetlands Law: The Cases and the Problems, 8 Harv. Envt'l L. Rev. 1, 5-8 (1984).

to refer to "a condition in which the *natural* structure and function of *ecosystems* is maintained." 1 Leg. Hist. 763 [emphasis added]. An additional goal states that the Act is intended to provide "for the protection and propagation of fish, shellfish, and wildlife. . . ." 33 U.S.C. 1251(a)(2).

Congress' use of these terms to describe the purposes of the 1972 Act suggests legislative awareness that a scientific approach would be necessary to solve a scientific problem. Such a view is consistent with Congress' approach to geographic jurisdiction in the 1972 Act which thoroughly demolished the traditional notion that federal regulatory authority should be limited to interstate or navigable-in-fact waters. The term "navigable waters," which states the geographic reach of the 1972 Act, including Section 404, is expressly defined in the statute to mean "waters of the United States," without qualification. 33 U.S.C. 1362(7). By this latter phrase Congress meant to include "*all* 'the waters of the United States' in a geographical sense." 1 Leg. Hist. 250 (Remarks of Rep. Dingell) [emphasis added]. The geographic jurisdiction of the 1972 Act is to be bounded only by the limits of Congress' constitutional power:

> The conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation. . . .

1 Leg. Hist. 327 (Conference Report).

The lesson of the previous 24 years of federal legislation was not lost on Congress. Natural aquatic systems pay no attention to state lines or the ability of a water body to float goods in commerce. Instead, as noted by the Senate Public Works Committee: "Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." 2 Leg. Hist. 1495. Thus the geographic reach of the 1972 Act must be viewed in terms of the natural functions of aquatic ecosystems subject only to the limits of Congress' power to regulate interstate commerce.

Section 404's regulation of discharges of dredged or fill material into "navigable waters" also reflects this congressional intent. Congress is presumed to have intended that the term "navigable waters" have the same broad meaning throughout the Act. See *Colautti v. Franklin*, 439 U.S. 379, 392-393 & n.10 (1979); 2A C. Sands, Statutes and Statutory Construction § 47.07 (4th ed. 1984 rev.). Thus, the express definition of "navigable waters" to mean "waters of the United States," 33 U.S.C. 1362(7), applies with equal force to Section 404.

Indeed, Section 404 is woven into the fabric of the 1972 Act and its goals. As stated in Section 301(a), the heart of the Act's regulatory mechanism,

> [e]xcept as in compliance with this section and sections 302, 306, 307, 318, 402, *and 404* . . ., the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. 1311(a) [emphasis added]. Violations of Section 301, and hence of Section 404, are punishable by civil and criminal penalties under Section 309, 33 U.S.C. 1319, the general enforcement provision for the Act. Therefore Congress' articulated effort to create broad geographic jurisdiction, coextensive with the Commerce Clause and consistent with scientific knowledge of ecosystem functions, applies to Section 404 as well as the rest of the 1972 Act.

Although the Corps of Engineers originally limited the Section 404 permit program to traditionally navigable waters, both the EPA and the Department of Justice read the 1972 Act and Section 404 to eliminate such historic limitations. See Want, Federal Wetlands Law: The Cases and the Problems, 8 Harv. Envt'l L. Rev. 1, 10-11 & n. 90 (1984). The courts agreed with EPA and the Justice Department and in 1975 the Corps was ordered to discard the traditional tests of navigability for geographic jurisdiction under Section 404. *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975). Later that year the Corps complied, promulgating the regulatory definition of "freshwater wetlands" initially involved in the present suit. 40 Fed. Reg. 31324-31325.

III. THE 1977 LEGISLATIVE HISTORY DEMONSTRATES A CONTINUED LEGISLATIVE COMMITMENT TO SECTION 404's GEOGRAPHIC JURISDICTION ESPECIALLY WITH REGARD TO WETLANDS.

In 1977 Congress revisited the 1972 Act. At that time efforts were made to amend Section 404 so that its geographic jurisdiction would be limited to waters navigable-in-fact, tidal waters, and wetlands adjacent thereto. Congress' rejection of those efforts underscores the legislative commitment to broad jurisdiction for Section 404, recognizing the natural functions of aquatic ecosystems, especially wetlands.

During the course of these legislative proceedings, opponents of amendments to reduce Section 404's geographic jurisdiction sought to persuade their colleagues by extolling the many valuable environmental functions performed by wetlands. The Senate Public Works Committee reported a bill to amend the 1972 Act in several respects but retaining intact Section 404's geographic jurisdiction. Members of the Committee, such as Senator Baker, defended continued Section 404 jurisdiction over wetlands by describing the many values of wetlands:

> As you know, wetlands are a priceless, multiuse resource. They perform the following services:
>
> First, high yield food sources for aquatic animals;
>
> Second, spawning and nursery areas for commercial and sports fish;
>
> Third, natural treatment of waterborne and airborne pollutants;
>
> Fourth, recharge of ground water for water supply;
>
> Fifth, natural protection from floods and storms; and
>
> Sixth, essential nesting and wintering areas for waterfowl.

> We should be mindful of the fact that when these areas are polluted out of existence, we will have lost the very valuable free service of nature; and if toxic-laden dredged or fill material is discharged into wetlands, we risk poisoning the very foundation of our aquatic system.

4 Leg. Hist. 923. (Debate on Senate bill). Other Committee members including Senators Stafford, Chafee, and Hart echoed this argument. *Id.* at 881-882, 917, and 927 (Debate on Senate bill). Senator Muskie, a member of the Committee as well as principal sponsor of the 1972 Act and floor manager of the 1977 bill, made a similar argument, describing wetlands as some of "the Nation's most biologically active areas." *Id.* at 869-870 (Debate on Senate bill).

Although an amendment limiting Section 404's geographic scope passed the House, opponents of that effort espoused these same values. For example, Representative Lehman argued that Section 404

> is a key to the protection of drinking supplies, finfish and shellfish spawning grounds, wildlife nesting and breeding areas, and countless aesthetic and recreation benefits that are enjoyed throughout the Nation. Furthermore, wetlands provide free of charge $140 billion worth of flood protection and water purification services, according to the clean water action project. Such priceless natural resources should be given Federal protection from development and destruction.

Id. at 1317 (Debate on House bill). Representative Bonior, whose District includes Riverside's wetlands, invoked similar arguments in support of broad Section 404 jurisdiction. *Id.* at 1320 (Debate on House bill); see also *id.* at 1247 (House Committee Report, Additional Views of Reps. Edgar and Myers). These arguments carried the day as Congress amended Section 404 in several respects but refrained from altering the Section's geographic scope enacted in 1972.

The 1977 legislative history is of particular significance in this case because Congress was consciously responding to

judicial decisions such as *NRDC v. Callaway, supra,* that had rejected the traditional navigability standards and applied Section 404 to wetlands. The Committee Report accompanying the House bill seeking to reduce Section 404 jurisdiction referred directly to *NRDC v. Callaway.* 4 Leg. Hist. 1216. Senator Bentsen proposed a similar amendment on the Senate Floor, arguing that the "scope of [Section 404] jurisdiction as defined by the courts" was inconsistent with Congress' original intent in 1972. *Id.* at 903.

In debate on the Conference Committee bill that left Section 404's jurisdiction intact, Representative Don H. Clausen reminded his colleagues that

> [a] full understanding of [the 1972 Act] can only be achieved by having an understanding of the case law interpreting the public law.

3 Leg. Hist. 374. Representative Clausen also referred in these remarks to a Library of Congress publication entitled "Case Law Under the Federal Water Pollution Control Act Amendments of 1972."[6] This document discusses (*id.* at 84-88) *NRDC v. Callaway, supra,* and other cases reaching similar conclusions on the scope of Section 404. Representative Clausen's statement and the Library of Congress litigation summary to which he referred demonstrate congressional awareness of the 1972 Act's meaning as construed by the courts. *Chemical Manufacturers Ass'n v. NRDC,* 105 S. Ct. 1102, 1109 & n. 17 (1985). Congress was clearly conscious that it was rejecting an effort to legislatively overrule that case law. See *id.*

In this context the view of a later Congress on an earlier enactment has "persuasive value" because

> "[h]ere we have Congress at its most authoritative, adding complex and sophisticated amendments to an already complex and sophisticated act. Congress is not merely expressing an opinion . . . but is acting on what it understands its own prior acts to mean."

Bell v. New Jersey, 461 U.S. 773, 784-785 & n. 12 (1983), quoting *Mount Sinai Hosp. v. Weinberger,* 517 F.2d 329, 343

[6] House Public Works and Transportation Committee Print 95-35.

(5th Cir. 1975). Thus Congress clearly intended the phrase "navigable waters" in the 1972 Act to include, without regard to artificial geographic limitations, the vast multitude of wetlands so beneficial to society. See *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F. 2d 617, 626 (8th Cir. 1979) (applying 1977 legislative history to determine regulatory scope of Section 404 as originally passed).

The 1977 legislative history clearly demonstrates that Section 404 applies to wetlands. Remarks praising the valuable biological and hydrologic contributions of wetlands, particularly when made during debate over geographic jurisdiction, cannot be squared with artificial geographic limits such as the traditional navigability test.

Moreover, the 1977 legislative history's recognition of wetlands values is entirely consistent with the 1972 Act's goals of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters[,]" and "the protection and propagation of fish, shellfish, and wildlife. . . ." 33 U.S.C. 1251(a) and (a)(2). This theme is echoed by Section 404(c) of the 1972 Act, which provides the Administrator of EPA with final authority to preclude discharge of dredged or fill material into sites where there will be "an unacceptable adverse effect on . . . shellfish beds and fishery areas (including spawning and breeding areas) . . . [and] wildlife. . . ." 33 U.S.C. 1344(c). The remarks of Senator Baker, Representative Lehman, and others during the 1977 debates demonstrate that Congress was well aware of the contributions wetlands make toward these goals.

Finally, congressional support for broad geographic jurisdiction is reflected in one of the amendments to Section 404 that Congress did pass in 1977. The addition of subsection (g) to Section 404 thoroughly repudiates any limitation of the Section to waters navigable-in-fact. Section 404(g) provides for state assumption of the Section 404 program under certain conditions. However, Section 404(g)(1) expressly excludes state assumption of jurisdiction over traditionally navigable and tidal waters, "including *wetlands* adjacent thereto. . . ." 33 U.S.C. 1344(g)(1) [emphasis added]. Thus Congress not

only used the word "wetlands" in Section 404 but also expressed its intent that the Section's geographic reach extend beyond traditional navigable waters. Had Congress intended to limit Section 404 to traditionally navigable waters in the first place, provision for state assumption of regulation over all other wetland areas would be meaningless because there would be nothing to assume. Section 404's geographic scope must be construed to avoid rendering Section 404(g) meaningless or superfluous. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-339 (1979).

IV. THE REGULATORY AGENCIES' DEFINITIONS OF "WETLANDS" FULFILL CONGRESSIONAL INTENT BY IDENTIFYING WETLAND AREAS LIKELY TO PERFORM FUNCTIONS CONGRESS CONSIDERED TO BE VALUABLE.

Section 404 must be interpreted "in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). Those purposes are reflected in the 1972 Act's removal of artificial barriers to geographic jurisdiction and the 1977 legislative history demonstrating congressional intent to protect wetlands because of the valuable functions they may perform. Significantly, Congress has never expressed any intent to limit the types of wetlands to which Section 404 should be applied. Therefore, as far as geographic jurisdiction is concerned, Section 404 should be interpreted to achieve Congress' purposes by extending to all areas that are likely to perform wetland functions.

The regulatory definition of wetlands must be scientifically valid to meet the 1972 Act's goal of maintaining and restoring the integrity of ecosystem functions. Scientific accuracy also ensures that the definition includes areas that may perform wetlands functions Congress considered to be valuable. Limitations on Section 404's geographic jurisdiction that are unrelated to the identification of wetlands areas and that ignore the way in which wetland ecosystems function must be rejected as contrary to congressional intent. Judged by these standards, the Corps' and EPA's definition of wetlands is consistent with Congressional intent while the court of appeals' requirement of "frequent flooding" (Pet. App. 15a) is not.

To a scientist, "wetlands" are essentially those areas where life can survive in a saturated environment. According to the United States Fish and Wildlife Service,

> wetlands are lands where saturation with water is the dominant factor determining the nature of soil development and the types of plant and animal communities living in the soil and on its surface. The single feature that most wetlands share is soil or substrate that is at least periodically saturated with or covered by water. The water creates severe physiological problems for all plants and animals except those that are adapted for life in water or in saturated soil.

U.S. Fish & Wildlife Service, Classification of Wetlands, *supra*, at 3.[7] The primary factors influencing wetland areas are the extent and duration of water present. As a result, life existing in such areas must be tolerant of or dependent upon saturated conditions to survive. Therefore, one of the most accurate approaches to identifying wetlands is to rely upon the presence of life forms that require or are tolerant of areas covered by or saturated with water.

The identical definitions of "wetlands" adopted by the Corps and the EPA for purposes of Section 404 regulation use this approach.[8] These definitions appropriately focus on "areas . . . inundated or saturated by surface or ground water at

[7] The U.S. Fish and Wildlife Service is responsible for administering the National Wetlands Inventory, see Section 208(i)(2), 33 U.S.C. 1288(i)(2), designed to use the Service's biological expertise to provide scientific information on wetlands characteristics as well as to indicate the extent of such areas in the United States. U.S. Fish & Wildlife Service, Wetlands of the United States: Current Status and Recent Trends 1 (1984). The information is intended to provide technical assistance to agencies regulating activities in wetlands. *Id.*; see 33 U.S.C. 1288(i).

[8] EPA shares Section 404 permit responsibility with the Corps. EPA has ultimate authority in permit decisions by virtue of its power to veto permits issued by the Corps. Section 404(c), 33 U.S.C. 1344(c). In addition, EPA has authority to bring an enforcement action against any unpermitted discharge of dredged or fill material into wetlands. Sections 301(a), 309(b) and (c), 33 U.S.C. 1311(a), 1319(b) and (c).

a frequency and duration sufficient to support . . . a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 323.2(c)(Corps) and 40 C.F.R. 230.3(t)(EPA). Thus, the "prevalence of vegetation" capable of surviving "in saturated soil conditions" is the focus of identifying wetlands for Section 404 regulatory purposes. These species of vegetation have been catalogued and there is widespread scientific agreement on their identity. See e.g. Preliminary Guide to Wetlands, *supra;* Classification of Wetlands, *supra.*

Wetlands may be formed by a variety of water sources including surface runoff, ground water tables, and water body overflow. M. Weller, Freshwater Marshes: Ecology and Wildlife Management 11-13 (1981) (hereafter "Weller"). The presence of enough water to create physiological stress for nonadaptive life forms is important. The source of the water is not. See Classification of Wetlands, *supra*, at 3. As a result there is no scientific basis for requiring a "hydrologic connection" between a wetland and nearby water bodies to create Section 404 jurisdiction. The regulatory definitions correctly avoid such a purely artificial limitation, stating that the "inundat[ion] or saturat[ion]" that supports wetland vegetation may be caused "by surface or ground water[,]" regardless of the source of that water. 33 C.F.R. 323.2(c) and 40 C.F.R. 230.3(t).

Finally, wetlands are dynamic areas that result from the interaction of climatic, geologic, hydrologic, and biologic processes. Gosselink & Turner, The Role of Hydrology in Freshwater Wetland Ecosystems, in Good, et al. (eds.), Freshwater Wetlands: Ecological Processes and Management Potential 64 (1978). A wetland area may fluctuate in size over time depending upon factors such as the amount of water available. McCormick, Ecology and the Regulation of Freshwater Wetlands, in *id.* at 353-354; Weller, *supra*, at 55. Any scientifically valid demarcation of wetlands must acknowledge the dynamic nature of wetlands because an area may presently provide wetland values even if it did not in the past. The Corps' preamble to the present regulatory definition of wetlands properly takes this fact into account: "Our intent under Section

404 is to regulate discharges of dredged or fill material into the aquatic system as it exists, and not as it may have existed over a record period of time." 42 Fed. Reg. 37128 (July 19, 1977). This conforms to Congress' recognition that "[e]cosystems themselves are dynamic, changing things." 1 Leg. Hist. 764 (House Committee Report on 1972 Act).

Therefore the regulatory definitions of wetlands for Section 404 purposes are consistent with congressional intent because they draw jurisdictional lines on the basis of ecosystem functions and apply Section 404 to areas likely to provide the kind of values identified by Congress in the 1977 legislative history. In fact, the agencies' approach to defining wetlands was noted with approval during the 1977 debates: "The location of a coastal marsh by using the aquatic vegetation line accurately identifies most marsh areas." 4 Leg. Hist. 922 (Remarks of Sen. Baker).

V. THE DECISION OF THE COURT BELOW IMPOSES AN ARTIFICAL JURISDICTIONAL LIMITATION ON SECTION 404 THAT EXCLUDES WETLANDS THAT CONGRESS INTENDED TO REGULATE.

Measured by the standards of congressional intent and scientific validity, the decision of the court below is incorrect. The Riverside tract clearly contains a wetland as demonstrated by the prevalence of plant species that require or are tolerant of saturated conditions and the abundant presence of wetland animal species such as the muskrat and long-billed marsh wren. Nonetheless the court of appeals excluded the site from the coverage of Section 404 because it is not "frequently flooded by waters from adjacent streams" (Pet. App. 15a).

This newly-invented standard imposes a completely artificial, nonscientific limitation on the geographic reach of Section 404. Such a result flatly contradicts Congress' well expressed intent that the 1972 Act's jurisdiction should recognize the existence of natural ecosystems and that Section 404 should apply to wetlands because those areas perform valuable functions.

Many types of wetlands that would not meet the court of appeals' standard nonetheless perform functions discussed in

the 1977 legislative history. For example, the Northern Great Plains contain approximately three million acres of "prairie pothole" wetlands formed by glacial depressions in a relatively flat landscape. U.S. Fish & Wildlife Service, Wetlands of the United States: Current Status and Recent Trends 42 (1984) (hereafter "Wetlands of the United States"). Although few of these wetlands are frequently flooded by adjacent streams they provide significant wetland functions. *Id.*; Weller, *supra*, at 7-9 and 12. Prairie potholes constitute only one-tenth of North America's waterfowl breeding area but produce half of the annual duck crop and provide substantial flood control functions, retaining up to 75% of surface runoff. Wetlands of the United States, *supra*, at 22 and 42-43. Many prairie potholes also contribute to groundwater recharge. *Id.* at 23.

Alaska's 100 million acres of tundra wetlands are the result of snowmelt and the thawing of permafrost substrate. Weller, *supra*, at 10; Office of Technology Assessment, Wetland Use and Regulation: Alaska Case Study 2-2 and 2-3 (1983). Frequent flooding by adjacent streams plays little or no part in the hydrology of these wetlands. Yet tundra wetlands provide nesting and breeding habitat for millions of ducks, geese, other waterfowl, and shorebirds which migrate to Alaska each year. *Id.* at iii, 2-6 and 2-7. Caribou herds depend on vast areas of wet tundra not only for calving grounds but also for migratory range which prevents depletion of their lichen food supply. *Id.* at iii and 2-6 through 2-8.

Similarly the 2.2 million acres of pocosin wetlands in North Carolina are formed by ground water and rainfall, not flooding by adjacent streams. C. Richardson, Pocosin Wetlands 5 (1981) (hereafter "Richardson"). These forested wetlands provide habitat for many animal species, including coastal black bears, and contribute to the well-being of shellfish and finfish nurseries. Wetlands of the United States, *supra*, at 49; Richardson, *supra*, 243-249.

Few if any of these wetlands fall within the court of appeals' narrow restriction on the geographic reach of Section 404. Nonetheless they are undoubtedly wetlands from a scientific point of view and perform valuable wetlands functions. These same functions stimulated Congress to include

wetlands within the scope of Section 404 as demonstrated by the statements made in the 1977 legislative history.

The decision of the court below is also contrary to congressional intent because it places scientifically unsound limits on the jurisdictional reach of the 1972 Act. Even though the vegetation on Riverside's tract is characterized by species adapted to waterlogged or highly saturated soils (such as cattails, sedge, and common reed), the court of appeals rejected these indicators because their presence was not necessarily caused by inundation from a nearby waterway (Pet. App. 11a-12a and n. 3). The court of appeals never explained why this hydrologic connection is required for an area to be a wetland subject to Section 404. From a scientific point of view the source of the water is irrelevant to the identification of a wetland. Accordingly, the court of appeals' implicit rejection of ground water as a source of saturation is exactly the kind of artificial distinction repudiated by Congress in the 1972 Act, as expressed by the Senate Committee Report:

> The Committee recognizes the essential link between ground and surface waters and the artificial nature of any distinction.

2 Leg. Hist. 1491.

The court of appeals was also incorrectly concerned with possible previous uses of the tract, as if those somehow bear relation to the existence of a wetland (Pet. App. 3a, 13a-14a, and 21a). However, the fact that fire hydrants and storm sewers may have been placed on the tract 70 years ago (and never used) does not prevent an area from being a wetland or performing wetland functions, as demonstrated by the Record in this case.[9] Also irrelevant is the remote possibility that the area's wetland characteristics stem from manmade flood control

[9] In fact Riverside's proposed fill will render the storm sewers useless as their openings will be several feet underground (Tr. Jan. 17, 1977 at 64). Therefore the existence of these obsolete "improvements" should not logically form a basis for denying federal jurisdiction over the filling activity.

structures.[10] As noted above, wetlands are dynamic ecosystems subject to fluctuation. Notwithstanding this trait, wetlands may still be valuable. For example, some prairie potholes may dry up entirely during some seasons and years. Weller, *supra*, at 55; Wetlands of the United States, *supra*, at 42-43. They are nonetheless valuable habitat for waterfowl during wet years and seasons. Therefore failure to include a wetland within Section 404 "as it exists," 42 Fed. Reg. 37128, at the time of regulation constitutes still another artificial, nonscientific limitation on jurisdiction. As such it is invalid.[11] See *United States v. Ciampitti*, 583 F. Supp. 483, 492-495 (D.N.J. 1984), appeal pending, No. 85-5004 (3rd Cir.) (rejecting prior uses of site as bar to Section 404 jurisdiction); *Swanson v. United States*, 600 F. Supp. 802, 807-809 (D. Idaho 1985), appeal pending, No. 85-3718 (9th Cir.) (manmade expansion of "navigable water" subject to Section 404 jurisdiction); cf. *United States v. City of Fort Pierre*, 747 F.2d 464 (8th Cir. 1984).

VI. SECTION 404 REGULATION OF RIVERSIDE'S WETLAND IS WELL WITHIN CONGRESS' CONSTITUTIONAL AUTHORITY.

The court of appeals' constitutional analysis (Pet. App. 13a-16a) completely ignores the fact that Congress intended the Commerce Clause to provide the only limits on the geographic reach of Section 404 over wetlands. See 1 Leg. Hist. 327. Instead the court of appeals asserted that the Just Compensation Clause dictates the narrow jurisdictional limitations fashioned by the court.

A. The Just Compensation Clause Does Not Preclude Congress' Authority to Regulate Discharges Into Wetlands.

The court's only authority for its "taking" holding, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), clearly upheld the federal government's Commerce Clause authority to assert

[10] It is possible that the tract would be *more* frequently inundated but for the system of dikes and drains in the vicinity (Tr. Jan. 15, 1977 at 156).

[11] In any event Riverside's tract has probably been a wetland for decades (J.A. 56).

regulatory jurisdiction over the fish pond in question. It is true this Court ruled that the United States' efforts to require public access to the fish pond would result in a taking under the peculiar circumstances of that case. *Id.* at 179-180. However, before reaching that conclusion the Court expressly held that the fish pond falls within "the boundaries of Congress' *regulatory authority* under the Commerce Clause. . . ." *Id.* at 172 [emphasis added]. Therefore *Kaiser Aetna's* taking holding applies only to the issue of requiring public access to private property, a point not raised by the present litigation. On the issue that is raised here, the extent of Congress' regulatory authority under the Commerce Clause, the Court found no taking and affirmed federal regulatory jurisdiction over the pond. *Id.* at 172 and 174. The court of appeals' reliance on *Kaiser Aetna* to limit Congress' Commerce Clause regulatory authority is completely misplaced.

Indeed, by relying on the Just Compensation Clause to limit Section 404's geographic reach, the court of appeals ruled in effect that Section 404 on its face constitutes a taking when applied to wetlands not "frequentiy flooded by . . . adjacent streams." However, Congress' power to regulate interstate commerce is not limited by the Just Compensation Clause even though the exercise of that power may occasionally result in a taking, so long as the statute in question leaves available an inverse condemnation action under the Tucker Act, 28 U.S.C. 1491. *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862, 2880-2883 (1984); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 n. 40(1981). The assertion of Section 404 jurisdiction does not preclude Riverside from availing itself of the Tucker Act.[12]

[12] This case is an enforcement action against an unpermitted discharge. Accordingly, the only jurisdictional issue should be the statutory and constitutional authority of the United States to require such a permit. Whether the subsequent denial of Riverside's application for a Section 404 permit was lawful and constituted a taking requiring just compensation are issues appropriately raised in separate litigation initiated by Riverside. Riverside has apparently never contested the denial of the permit or pursued a Tucker Act claim for compensation.

B. Congress' Determination That Destruction of Wetlands Substantially Affects Interstate Commerce Has a Rational Basis.

In view of Congress' express intent that the term "navigable waters" in the 1972 Act should "be given the broadest possible constitutional interpretation," 1 Leg. Hist. 327, the geographic reach of Section 404 is coextensive with Congress' authority to regulate interstate commerce.[13] Therefore, the appropriate constitutional analysis in this case is to determine what limit, if any, the Commerce Clause places on Congress' assertion of geographic jurisdiction over wetlands, an issue completely ignored by the court below.

Clearly all wetland areas falling within the Corps' and the EPA's regulatory definitions of "wetlands" are well within the Commerce Clause. Congress' "plenary authority" to regulate interstate commerce, *United States v. Darby*, 312 U.S. 100, 115 (1941), is "as broad as the needs of commerce." *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940). This power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824). The Commerce Clause authority

> extends not only to "the use of channels of interstate or foreign commerce" and to "protection of the instrumentalities of interstate commerce . . . or persons or things in commerce," but also to "activities affecting commerce."

Hodel v. Virginia Surface Mining, supra, 452 U.S. at 276-277, quoting *Perez v. United States*, 402 U.S. 146, 150 (1971). When Congress elects to regulate an entire class of activities that substantially affect interstate commerce, even purely intrastate activities fall within the federal power. *Perez v. United States, supra*, 402 U.S. at 154. In such a case, "the courts have no power 'to excise, as trivial, individual instances' of the class." *Id.* quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968).

[13] It is clear from Rep. Dingell's remarks that Congress intended to invoke its Commerce Clause authority in enacting the 1972 Act. 1 Leg. Hist. 250-251 (Debate on Conference bill).

"The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow." *Hodel v. Virginia Surface Mining, supra,* 452 U.S. at 276. Congress' determination that discharge of dredged or fill material into the Nation's wetlands substantially affects interstate commerce must be upheld if there is "any rational basis for such a finding." *Id.; Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 258 (1964). Section 404's embrace of areas likely to perform the valuable functions identified in the 1977 legislative history clearly meets this test.[14]

During the 1977 debates, Senator Stafford defended his Committee's retention of Section 404's original geographic reach by estimating that at least 300,000 acres of wetlands are destroyed in the United States each year. 4 Leg. Hist. 882. A more recent estimate put the figure at 450,000 acres. Wetlands of the United States, *supra,* at 31. The 1977 legislative history is replete with detailed references to the effects of this destruction on interstate commerce.

For example, Representative Lehman noted that wetlands provide "$140 billion worth of flood protection and water purification services. . . ." 4 Leg. Hist. 1317. Senator Chafee observed that 98 percent of Maine's $50 million-per-year fish harvest "was made up of species that depended upon the wetlands for some part of their life cycle." *Id.* at 917. Congress was also aware that wetlands make an enormous contribution to wildlife and fisheries habitat. See *id.* at 881-882 (Remarks of Sen. Stafford), 923 (Remarks of Sen. Baker), 927 (Remarks of Sen. Hart), and 1320 (Remarks of Rep. Bonior).

There is clearly a rational basis for the conclusion that wetlands filling has a substantial effect on interstate commerce. To take one example, the prairie potholes of the Northern Great Plains make up "[t]he principal waterfowl breeding grounds in the continental United States," *North Dakota v.*

[14] As demonstrated below, the filling of wetlands not only "affects" interstate commerce, it does so *substantially,* fully as much as surface mining of coal. See *Hodel v. Virginia Surface Mining, supra,* 452 U.S. at 307-313 (Rehnquist, J., concurring in judgment).

United States, 460 U.S. 300, 304 (1983), and produce over one-half of the newborn wild duck population every year. Wetlands of the United States, *supra,* at 42. Waterfowl travel annually along migratory corridors that encompass all or parts of 49 states. F. Bellrose, Ducks, Geese & Swans of North America 20-24 (1976). "The protection of migratory birds has long been recognized as 'a national interest of very nearly the first magnitude.'" *North Dakota v. United States, supra,* 460 U.S. at 309, quoting *Missouri v. Holland,* 252 U.S. 416, 435 (1920).

The hunting of migratory birds, including waterfowl, is a $638 million per year industry. U.S. Fish & Wildlife Service, 1980 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation 70 (hereafter "Wildlife Survey"). Approximately 421,000 hunters annually cross state lines to hunt migratory birds. *Id.* at 88. Millions of dollars are spent each year to purchase equipment such as field guides and binoculars for use in observing and photographing waterfowl in the United States.[15] *Id.* at 108 and 114. Obviously the destruction of "essential nesting and wintering areas for waterfowl," 4 Leg. Hist. 923 (Remarks of Sen. Baker), could substantially burden interstate commerce by affecting these expenditures. See *Utah v. Marsh,* 740 F.2d 799, 804 (10th Cir. 1984) (intrastate lake subject to Section 404 regulation because it provides habitat for migratory waterfowl).

As another example, the destruction of portions of the remaining 2.2 million acres of North Carolina's pocosin wetlands increases freshwater runoff into saltwater and brackish estuarine systems. Richardson, *supra,* at 243-249. This destruction upsets the salinity balance in these systems which destroys their usefulness as shellfish and finfish nurseries. *Id.* North Carolina's coastal fishing industry generates an estimated $300 million in revenues per year and is dependent upon these estuarine nurseries. *Id.* at 238-239.

[15] Nineteen million people observed, photographed, or fed wild waterfowl in 1980. Wildlife Survey, *supra,* at 108. That same year approximately $97 million was spent on field guides and binoculars primarily for the observation of wildlife. *Id.* at 114.

These examples cover only a narrow portion of the impacts on interstate commerce resulting from the destruction of wetlands "essential to the preservation of migratory and resident fish, bird and other animal populations. . . ." 4 Leg. Hist. 881-882 (Remarks of Sen. Stafford). The wildlife habitat impacts alone demonstrate the rational basis for Congress' determination that interstate commerce is adversely affected by the destruction of wetlands. The impacts on air and water quality and flood control, in combination with habitat destruction, clearly show that elimination of wetlands substantially affects interstate commerce. See *Hodel v. Virginia Surface Mining, supra*, at 277-280. As this Court ruled in *Hodel*, " the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Id.* at 282 (footnote omitted).

In addition it is a classic exercise of Commerce Clause power to enact federal legislation imposing minimum standards on commercial activity to protect states that regulate the activity from competition with those states that do not. *United States v. Darby, supra*, 312 U.S. at 115. Prevention of industrial "forum shopping" is appropriate in the context of environmental regulation. *Hodel v. Virginia Surface Mining, supra*, 453 U.S. at 281-282.

Concern with this sort of "ecological blackmail," 1 Leg. Hist. 869 (House Committee Report, Additional Views of Reps. Abzug and Rangel), clearly influenced enactment of the 1972 Act:

> When states are confronted by competition for industrial locations, water quality so often is the real loser.

1 Leg. Hist. 433 (Testimony of League of Women Voters inserted in the Record by Rep. Gude). The Governor of Minnesota complained in House Committee testimony of "the practice of playing off one state against the other." *Id.* at 452

(Testimony quoted in Remarks of Rep. Reuss); see D. Zwick and M. Benstock, Water Wasteland 231 (1971).[16]

The forum shopping problem is an obvious concern in the context of Section 404, particularly because 95 percent of the Nation's wetlands are inland wetlands which are not protected by law in most states. Office of Technology Assessment, Wetlands: Their Use and Regulation 187-188 (1984). Assertion of federal jurisdiction over wetlands is well within Congress' power to regulate interstate commerce. See *Hodel v. Virginia Surface Mining, supra*, 452 U.S. at 281-282.

It is also clear that the Commerce Clause authority extends even to wetlands that might be "intrastate" in character. Wetlands that are not hydrologically connected to a traditionally navigable water and that are completely contained in one state may still exert a substantial effect on interstate commerce as in the case of prairie potholes. Even though the filling of one such wetland may seem local in nature, that "by itself is not enough to remove [it] from the scope of federal regulation where," the impact, "taken together with that of many others similarly situated, is far from trivial." *Wickard v. Filburn*, 317 U.S. 111, 127-128 (1942). The destruction of 300,000 to 450,000 acres of wetlands per year can hardly be considered trivial. Congress may properly consider all discharges of dredged or fill material into wetlands to constitute, in combination, a substantial impact on interstate commerce and hence regulate them all. See *United States v. Darby, supra*, 312 U.S. at 123.

Therefore, Congress' evident intent to adopt a regulatory program with comprehensive geographic jurisdiction over wetlands is entirely consistent with the Commerce Clause. Since Riverside's tract indisputably falls within the regulatory definitions, the discharge of dredged or fill material onto the site is properly governed by Section 404. The court of appeals'

[16] These concerns led to the 1972 Act's creation of national effluent standards "so that industries will no longer be able to relocate to a community of less stringent pollution standards. . . ." 1 Leg. Hist. 132 (Remarks of Sen. Williams).

exclusion of the tract from this regulatory program is incorrect as a matter of statutory interpretation and constitutional legislative authority.

CONCLUSION

For these reasons and those stated in the Brief of the United States, the judgment of the court below should be reversed.

Respectfully submitted,

JERRY JACKSON
National Wildlife Federation
1412 Sixteenth Street, N.W.
Washington, DC 20036
(202) 797-6827

Counsel of Record and
Attorney for Amici Curiae

FRANK J. KELLEY
Attorney General
LOUIS CARUSO
Solicitor General
State of Michigan
760 Law Building
Lansing, Michigan 48913
(517) 373-1110

May 1985

APPENDIX A

Detailed Statement of Interests

The National Wildlife Federation is a nonprofit membership organization incorporated in 1939 under the laws of the District of Columbia. The Federation maintains its headquarters at 1412 Sixteenth Street, N.W., Washington, DC 20036 (telephone 202-797-6827). The Federation is the largest nongovernmental conservation education organization in the world, with affiliate organizations in 50 states and three territories. Its 4.1 million members and supporters are dedicated to increasing public awareness of the need for wise use, proper management, and conservation of our natural resources. The Federation undertakes a comprehensive conservation education program, distributes numerous periodicals and educational materials, lobbies for the adoption of laws to protect and improve the environment, and litigates when necessary to conserve natural resources and wildlife. The Federation has undertaken a wide range of legal, legislative, administrative, and educational initiatives aimed at improving the conservation of wetlands and other wildlife habitat.

The State of Alaska contains as many as 200 million acres of wetlands, including almost 100 million acres of tundra. Unlike most states, Alaska has retained most of its wetlands intact. The people of Alaska depend on wetlands to support wildlife habitat and fisheries. Because these valuable wetlands are subject to development pressure, the State of Alaska supports a strong federal regulatory program of wetlands protection.

The American Fisheries Society is a nonprofit professional society organized in 1870 to promote the conservation, development and wise utilization of recreational and commercial fisheries. The Society supports the conservation of wetlands because such areas play a critical role in the well-being of many fisheries. The Society has 8,300 members.

The Bass Anglers Sportsman Society (BASS) is a nonprofit membership organization founded in 1968 to fight pollution and provide conservation education. BASS's member

sportsmen and 1500 affiliated local chapters are located in all 50 states. BASS's members are committed to the preservation of wetlands and water quality in order to maintain and enhance the nation's fishery resources.

The Chesapeake Bay Foundation, Inc., is a nonprofit regional membership organization founded in 1966 to promote the environmental welfare and proper management of Chesapeake Bay, including its tributaries. The Foundation accomplishes these goals through citizen representation, environmental education, and land preservation. The Foundation has 25,000 members.

The Environment Council of Rhode Island, Inc., is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

The Environmental Defense Fund, Inc., is a nationwide public interest organization of lawyers, scientists, and economists dedicated to protecting and improving environmental quality and public health. The Fund pursues responsible reform of public policy in a number of environmental fields including water resources, land use, wildlife, and wetlands conservation, working through research, public education, and judicial, administrative, and legislative action. The Fund has 50,000 members including residents in all 50 states.

The Environmental Policy Institute is a nonprofit organization that conducts research, education, lobbying, and litigation on key energy and environmental laws. The Institute is dedicated to organizing economically, politically, and geographically diverse citizen coalitions on environmental issues including water quality and wetlands protection. The Institute produces a periodic educational newsletter reporting on these issues to concerned citizens across the country.

The State of Florida has a vital interest in protecting the significant wetland resources found in Florida. Over 40 percent of Florida's original wetlands have been destroyed by human activity. This loss has had a devastating effect on Florida's economy, causing increased flooding of property and decreased catches in fisheries dependent upon wetlands. Although Florida

has enacted wetlands legislation, a strong federal regulatory program is necessary to enhance State wetlands protection.

The Florida Audubon Society is a statewide nonprofit organization founded in 1900 to provide an understanding of, and an interest in wildlife, and in the environment that supports it, and to further the cause of wildlife conservation.

The Florida Wildlife Federation is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

The Louisiana Wildlife Federation is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

The State of Michigan was the first state in the Nation to assume responsibility for dredge and fill projects in waters regulated under Section 404 of the Clean Water Act, 33 U.S.C. 1344, from the United States Environmental Protection Agency. Michigan has a long history of concern for, and actions to protect, its valued wetlands. Michigan is vitally interested in the outcome because the controversy involves natural resources located within the State of Michigan.

Michigan United Conservation Clubs, Inc., is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

The National Audubon Society is a nonprofit national membership organization dedicated to the conservation and wise use of wetlands and other natural resources. Since the turn of the century, National Audubon has been active in efforts to protect migratory birds and their habitat, including wetlands. National Audubon has over one-half million members in the United States and several foreign countries. These members use the nation's wetlands for birdwatching, fishing and other recreational pursuits, and for scientific research. National Audubon owns and manages a nationwide system of sanctuaries totaling over 200,000 acres, many of which contain wetland systems, which provide essential habitat for birds, other wildlife and rare plants.

The North Carolina Wildlife Federation is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

Scenic Hudson, Inc. is a nonprofit, citizen's conservation group founded in 1963 to improve and preserve the natural, recreational, historic and scenic resources of the Hudson River Valley, including wetlands.

The Sierra Club is a nonprofit national membership organization founded in 1892 to promote the responsible use of the earth's ecosystems, to enjoy and protect the earth's resources, and to educate humanity in the need to protect and restore the quality of the natural and human environment. With approximately 336,000 members and 54 local chapters coast to coast, the Sierra Club works on legislation, litigation, public information, and outings to protect, understand, and enjoy the natural environment.

The South Carolina Wildlife Federation is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

The Tennessee Conservation League is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

Trout Unlimited is a nonprofit international conservation organization founded in 1959 and dedicated to the protection of clean water and the enhancement of trout and salmon fishery resources. Trout Unlimited has 32,000 members.

The Wildlife Federation of Alaska is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

The Wildlife Management Institute is a national nonprofit membership organization, supported by industries, groups, and individuals, promoting better use of natural resources for the welfare of the Nation. The Institute is particularly concerned with the conservation of wetlands because of the importance of this resource to wildlife habitat.

The Wisconsin Wildlife Federation, Inc. is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.